UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
AIR AND RADIATION

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Dear Mr. Montague:

On February 2, 2012, you submitted a petition, on behalf of Daimler Trucks North America, LLC and Detroit Diesel Corp. ("Daimler") to the Honorable Lisa P. Jackson, Administrator of the Environmental Protection Agency that requested a stay of an Interim Final Rule that was signed on January 20, 2012 and published in the Federal Register on January 31, 2012 (77 Fed. Reg. 4678). The Interim Final Rule (IFR) established interim nonconformance penalties (NCPs) for the NOx emission standard applicable to heavy heavy-duty engines that went into full effect in model year 2010 ("2010 NOx standards").[1] On that same day, EPA also published a Notice of Proposed Rulemaking (NPRM) proposing and seeking comment on final NCPs to replace the interim NCPs. (77 Fed. Reg. 4736).

For the reasons provided in this response, EPA is denying your request for a stay of the IFR. However, EPA plans to continue to communicate with Daimler as part of the rulemaking process.

I. Introduction

Clean Air Act (CAA) section 206(g) states that for heavy duty engines subject to CAA emission standards, a certificate of conformity "shall be issued ... for such vehicles or engines manufactured by a manufacturer notwithstanding the failure of such vehicles or engines to meet such standards if such manufacturer pays a nonconformance penalty as provided under regulations" promulgated by EPA. The IFR published on January 31 was promulgated pursuant to this statutory provision.

[1] The 0.20 g/hp-hr NOx standard currently applicable to heavy-duty engines was published January 18, 2001 (66 FR 5001) and first applied in the 2007 model year. However, because of phase-in provisions adopted in that rule and use of emission credits generated by manufacturers for early compliance, manufacturers were able to continue to produce engines with NOx emissions over 0.20 g/hp-hr until (and in some cases after) 2010 model year. The phase-in provisions ended after model year 2009 and a final emission cap was adopted so that the standards were fully phased-in for model year 2010. Because of this, the 0.20 g/hp-hr NOx emission standard is often referred to as the 2010 NOx emission standard, even though it applied to engines as early as model year 2007. For this rulemaking, the fully phased-in NOx requirements are referred to as the 2010 NOx standards.

EPA regulations establish three criteria for EPA to promulgate NCPs. 40 C.F.R. § 86.1103-87. The first is that the new or revised standard is more stringent than the previous emission standard for that pollutant. Second, substantial work must be required in order to meet the emission standard. EPA considers "substantial work" to mean the application of technology not previously used in that vehicle or engine class/subclass, or a significant modification of existing technology, in order to bring that vehicle/engine into compliance. Third, there must be a likelihood of a "technological laggard," which is an engine manufacturer that cannot meet the requirements for technological reasons. EPA found that all these criteria were met for the IFR. 77 Fed. Reg. at 4681.

EPA also determined that good cause existed under section 553(b)(B) of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. to find that notice and comment are impracticable, unnecessary or contrary to the public interest in this instance. *Id.* at 4680. EPA noted several factors considered in reaching this determination:

1. Taking interim final action avoids the possibility of an engine manufacturer being unable to certify a complete product line of engines for model year 2012 and/or 2013.
2. The Agency is only amending limited provisions in existing NCP regulations in 40 CFR part 86.
3. The rule's duration is limited (see, e.g., Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (DC Cir. 1983)).
4. There is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking.

EPA also found that since the IFR "can be considered to either effectively grant an exemption from meeting the current applicable NOx emission standard or relieve a restriction that would otherwise prevent a manufacturer from certifying," it could be made effective immediately upon publication in the Federal Register under section 553(d) of the APA. *Id.*

EPA intends to issue a Final NCP Rule later this year that will supersede the Interim Final NCP Rule. For purposes of this response, the period between the effective date of the Interim Final Rule and the effective date of the Final Rule will be referred to as the interim period.

Daimler's Petition for Stay (Petition) was filed pursuant to section 705 of the Administrative Procedures Act, 5 USC § 705.[2] In determining whether a stay should be granted, the courts (and here the Agency) weigh these four factors.

1. The substantial likelihood that the Petitioner will prevail on the merits of its case.
2. The likelihood that the Petitioner will suffer irreparable harm absent a stay.
3. The likelihood that no adverse party will be substantially harmed by a stay.
4. The public interest.

[2] Section 705 of the APA authorizes an agency to "postpone the effective date of action taken by it, pending judicial review." In this case, the IFR was made effective upon publication, raising a question of whether EPA could postpone the effective date as the effective date has already passed. However, EPA does not need to reach this issue as the request for a stay is being denied for the reasons discussed herein.

Davis v. Pension Benefit Guaranty Corporation, 571 F. 3d 1288, 1291 (D.C. Cir. 2009)

> The four factors have typically been evaluated on a "sliding scale." If the petitioner makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor. For example, if the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success. Alternatively, if substantial harm to the non-movant is very high and the showing of irreparable harm to the movant very low, the movant must demonstrate a much greater likelihood of success. It is in this sense that all four factors must be balanced against each other. When seeking a preliminary injunction, the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.

Id. at 1291, 1292. (internal quotes and cites removed)

The Petition states that all four factors support staying the IFR. However, after evaluating Daimler's petition, EPA believes that on balance, Daimler has not met its burden to show that a stay should be granted.

II. Substantial Likelihood of Prevailing on the Merits

We disagree that the petitioner is substantially likely to prevail on the merits. The petitioner claims that it is likely to prevail for three reasons. It claims:

1. EPA did not meet the regulatory criteria for promulgating NCPs;
2. EPA did not meet the statutory requirements for promulgating NCPs.
3. EPA promulgated the IFR without notice and comment.

A. Justification for Promulgating NCPs

The petitioner claims that EPA's regulatory triggers for granting NCPs "will rarely be met." This statement is belied by the history of EPA's granting of NCPs. EPA granted NCPs six times since those triggers were adopted in 1985 (50 FR 35374), including the most recent significant increases in stringency for heavy duty engines prior to the regulations promulgated in 2001 that were the impetus for the current NCPs. In 1996, EPA set NCPs for 1998 heavy-duty NOx emission standard (4.0 g/hp-hr), as well as certain other standards (61 FR 6949, February 23, 1996). The 1998 NOx emission standard was set 20 percent below the previous 5.0 g/hp-hr NOx emission standard. In 2002, EPA set NCPs for 2004 heavy-duty NOx+NMHC emission standard (67 FR 51464, August 8, 2002). The 2004 standard was set as a combined NOx+NMHC standard of 2.5/g/hp-hr. This standard was generally accepted to be roughly equivalent to a NOx-only emission standard of 2.0 g/hp-hr. Thus the 2004 emission standard represented a reduction in the standard of about 50 percent. Indeed, while EPA has not granted NCPs every time it has increased the stringency of standards for heavy duty engines, it has done so often, and for increases in stringency much less significant than 90% reduction in NOx required by the current standards.

Similarly, petitioner claims that there is no new standard new or revised standard going into effect in 2012. This ignores the fact that a new standard did go into full effect in 2010 that reduced the NOx standard for heavy duty engines by approximately 90% from the previous standard that went into effect in 2004, and by approximately 80% from the interim average requirements that went into effect in 2007. EPA did not promulgate NCPs for the 2010 and 2011 model years because no manufacturer required such NCPs, as all manufacturers met the standard either directly or through application of credits. The fact that EPA did not promulgate NCPs for the first year a standard went into effect does not forever preclude EPA from promulgating NCPs for such standard when it is determined they are necessary. The 2010 standard is certainly a new or revised standard and certainly is more stringent than the previous standard for NOx.

Petitioner also claims that substantial work was not necessary to meet the emission standard. Substantial work means "the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance." 40 C.F.R. § 86.1103-87(b). There can be no argument that substantial work was necessary to meet the 2010 NOx standard. Every manufacturer other than Navistar has for the first time included an aftertreatment, selective catalytic reduction (SCR), on their engines to meet the standard, and Navistar has also greatly modified in exhaust gas recirculation (EGR) system to reduce its NOx emissions and would likely need to do significant more work to further reduce its NOx emissions to meet the standard. These are substantial changes to the emission control systems of these engines. While manufacturer may currently be using SCR systems, they were doing so until they were required to meet the 2010 NOx standard. Therefore, it is clear that substantial work was needed to meet the standard.

Petitioner also claims that EPA did not identify a true technological laggard. In 40 CFR 86.1103-87(a)(2), EPA specifies that, before issuing NCPs, it must find "that there is likely to be a technological laggard." While the regulations do not define this term, as the petitioner noted, in the past EPA has interpreted this as meaning a manufacturer who cannot meet the emission standard due to technological difficulties, not merely economic difficulties. 67 Fed. Reg. 51,464, 51,465 (Aug. 8, 2002). It is also important to note that the regulations do not require EPA to be certain that one or more manufacturers will actually be unable to meet the standard for technological reasons. Rather, the regulations specify that it is sufficient for EPA to find a likelihood that this will be the case.

Based on confidential business information available to EPA at the time the Interim Final Rule was signed, EPA determined that there was no viable technological path available to Navistar during the interim period that would allow it to produce engines that fully comply with 0.20 g/hp-hr NOx emission standard, or to use compliant engines made by another engine manufacturer in its vehicles. This determination was based on EPA's analysis of the performance of Navistar's emission controls, which unlike the rest of the industry do not rely on selective catalytic reduction (SCR). The determination was also based on the amount of time it would take redesign its engines and vehicles for an alternate compliance path that would use SCR to reduce NOx emissions. These limitations are technological rather than economic in nature, and no amount of money could be spent by Navistar to bring its engines into compliance during the interim period.

Navistar could have decided two years ago to apply Selective Catalytic Reduction (SCR) to its engines, as the rest of the industry did. However, it made a decision to attempt to meet the emission standard without SCR. The emission standard adopted by EPA is a performance standard, and does not require that all manufacturers use the same technology to meet the standard. Congress, understanding that

manufacturers may not all be in the same place regarding compliance with technology-forcing standards, specifically permitted manufacturers to emit higher levels of pollutants using NCPs. Having made its decision to use a different technology to meet the standards, Navistar has not yet developed and produced engines that meet the 0.020 standard. This is similar to the circumstances in 2002 when Caterpillar developed its "ACERT" technology rather than use cooled exhaust gas recirculation (EGR) technology and needed to use NCPs while developing ACERT.[3]

Daimler also notes statements by Navistar officials stating that Navistar is prepared to introduce an engine that does meet the 0.20 g/bhp-hr NOx limit and that Navistar has filed for certification of this engine. Further, Daimler provides a statement from a Navistar official indicating that Navistar will apply for NCPs not because of technological concerns with its 0.20 g/bhp-hr engines, but because its other engines get better fuel economy.

EPA has indeed received an application for certification from Navistar for a 0.20 g/bhp-hr engine. However, EPA's initial view is that there are several significant problems with Navistar's application. EPA is not prepared to share publicly these problems at this time, because Navistar has claimed much of their information as confidential. While EPA has not taken final action regarding certification, and intends to continue discussions with Navistar, EPA has substantial concerns regarding the ability of Navistar to certify its engine at a 0.20 g/bhp-hr level. In addition, even if Navistar's engine could be certified, Navistar apparently will not be able to introduce the engine into commerce until June15, 2012 at the earliest, based on their request for certification. Therefore, the situation remains that absent the NCPs authorized under the IFR, Navistar would have no ability to introduce its engines. Thus, nothing in Navistar's recent actions changes EPA's view that a technological laggard exists. It is also important to note that the statements referred to were made after the NCP rule was signed, and thus was not available to EPA prior to promulgation.

B. Penalty Level

With respect to the level of the NCPs, we note that the only evidence provided by the petitioner were comparisons to EPA's most recent NCP rulemaking and to the hardware costs associated with SCR. While we acknowledge that the maximum penalties under the interim NCPs will be lower than the maximum penalties under the most recent prior NCPs, we do not believe this to be the relevant analysis. EPA's statutory obligation is to set the NCPs at a level that "shall remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emission reduction." The petitioner provided no evidence to support its claim that the interim NCP does not meet this requirement. However, even if comparisons to prior NCPs were relevant, we note that, while the maximum penalties under the interim NCPs will be lower than the maximum penalties under the most recent prior NCPs, they will be higher than other prior NCPs. Moreover, we note that when expressed as dollars per g/hp-hr emission exceedance, the interim NCPs are actually higher than those established in the most recent prior NCP rule, as shown in the following table:

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[3] *See* "Caterpillar Announces Plans to Phase Out Bridge Engines," Transport Topics, Sept. 9, 2003; Final Technical Support Document: Nonconformance Penalties for 2004 Highway Heavy Duty Diesel Engines, EPA420-R-02-021 August 2002, at 11-12 ("Engine manufacturers generally agree with us that cooled EGR is one of the principal technologies capable of achieving the 2004 emission standards. In the past several months, a number of engine manufacturers have announced they are pursuing cooled EGR technology as their principle means of complying with the 2004 standards. In addition, at least one engine manufacturer [identified as Caterpillar] has announced they are pursuing an alternative technology for complying with the 2004 HDDE standards which does not include the use of cooled EGR.")

Comparison of Interim 2010 NCPs to Most Recent NCPs for Heavy Heavy-Duty Engines			
Standard	Upper Limit	COC90 (in 2011 Dollars)	Dollars per g/hp-hr
4.0 g/hp-hr 1998 NOx Standard	5.0 g/hp-hr	$3,855	$3,855
2.4 g/hp-hr 2004 NOx+NMHC Standard	6.0 g/hp-hr	$15,508	$4,308
0.20 g/hp-hr 2010 NOx Standard	0.50 g/hp-hr	$1,919	$6,397

Moreover, petitioner had a full opportunity to provide its comments on the proper level for NCPs. Prior to issuing the Interim Final Rule, EPA held several conference calls with the engine manufacturers, including petitioner, who certified heavy heavy-duty engines at or below the 0.20 g/hp-hr NOx emission standard. For each of these manufacturers, there was an initial call informing it of EPA's intent to adopt NCPs for heavy heavy-duty engines and EPA staff's initial thoughts on the cost analysis. EPA held at least one follow-up call with each of these manufacturers in which the manufacturer provided information about costs of compliance. EPA had similar discussions with Navistar. Daimler therefore had substantial opportunity to provide its views and information regarding the proper level for NCPs and EPA's initial thoughts, including its intentions to estimate compliance costs relative to a baseline engine (with emissions at the upper limit) that includes both SCR and EGR hardware.

The petitioner also claims, without further information, that the penalty is too low because it does not take into account the numerous costs faced by manufacturers in developing and using SCR. As noted, EPA explained to manufacturers that it was estimating compliance costs presuming a baseline engine that met an emission level of 0.50 g/hp-hr, rather than the previous standard of approximately 2.0 g/hp-hr, because all engine manufacturers were meeting the 0.50 g/hp-hr level. Manufacturers, including Navistar, all had expended considerable costs to achieve the 0.50 g/hp-hr level. Under the regulations, the relevant compliance costs are the difference in life-cycle costs between the upper limit engine (here, a 0.50 g/hp-hr engine) and an engine with NOx emissions below the 0.20 g/hp-hr standard. This includes fixed costs such as research and development, hardware and manufacturing costs, and operating costs. This excludes costs associated with reducing emissions from the previous emission standard to 0.50 g/hp-hr.

Moreover, EPA explained that its costs presumed a baseline engine that already contained both SCR and EGR. EPA explained that using this baseline would mean that most of the hardware costs associated with adding SCR to an engine would not be included in the compliance costs. The most significant of the NCP parameters in the regulations is the 90^{th} percentile costs of compliance, COC_{90}, which defines the penalty for engines emitting at the upper limit. This cost should represent what the costs would be for the manufacturer with the highest life-cycle compliance costs of compliance. EPA estimated COC_{90} by assuming the baseline engine would have been an SCR equipped engine with NOx emissions at 0.50 g/hp-hr and that it looked very similar to an engine with NOx emissions at 0.20 g/hp-hr. However, the higher NOx emissions of the baseline engine would allow the use of less expensive hardware and would require less consumption of liquid urea (also known as diesel emission fluid or "DEF").

EPA did consider the other technology paths suggested by manufacturers (which assumed baseline engines with EGR but not SCR, or baseline engines with SCR but not EGR).[4] However, EPA rejected these approaches because of concerns about the inaccuracy of projecting large changes in operating costs. In the "Interim and Proposed Technical Support Document for this rule ("TSD"), EPA-HQ-OAR-2011-1000-0014, EPA noted that it is possible that over the life of a truck, the increased operating costs could even be greater than the original hardware cost. The complete cost analysis is described in Chapter 3 of the TSD. The cost parameters included engine manufacturing costs, vehicle manufacturing costs, and operating costs. Engine manufacturer costs for emissions control include variable costs (for incremental hardware, assembly, and associated markups), fixed costs (for tooling, research and development, etc.), and warranty costs. EPA also evaluated whether vehicle manufacturers are expected to incur some variable hardware costs or some fixed costs. Owner costs can include fuel costs, diesel exhaust fluid costs, maintenance and repair costs, and costs associated with any time that the vehicle is down for repair.

EPA further explained that it intended to use this baseline approach because of concerns about accurately estimating the potentially large difference in fuel consumption rates between SCR-equipped engines at 0.20 g/hp-hr NOx and a non-SCR engine at 0.50 g/hp-hr NOx. Daimler's comments therefore ignore the better fuel consumption of SCR equipped engines compared to EGR-equipped engines with comparable NOx emissions. As noted on page 32 of the TSD, EPA estimates that each one-percent reduction in fuel consumption results in a discounted lifetime fuel saving of $986 for the typical operator. However, the engine manufacturers that are using SCR have claimed the SCR engines have significantly better fuel consumption than even their 2009 engines with NOx emissions at nearly 1.2 g/hp-hr. Thus, we believe that there is net savings in operating costs so that the life cycle costs for SCR engines are much lower than the cost of the SCR hardware.

EPA also specifically reviewed competitive issues in section 4 of the IFR. When EPA considered the available information about market prices and market share, it found them to be supportive of the conclusion that the NCPs are large enough to remove the competitive disadvantage to complying manufacturers. For example, EPA based its maximum penalty on its estimated "worst case" cost that a manufacturer would have to pay to reduce emissions from the base engine to the standard. Moreover, EPA examined the "emissions surcharge" (the increase in price manufacturers charge to recover the cost of reducing emissions) that manufacturers of SCR-equipped engines charged in comparison with that charged by Navistar, and found that while manufacturers of SCR-equipped engines did have a larger emissions surcharge, the difference in surcharges was less than the NCP that EPA promulgated for such engines. See Section 4.2 of the TSD for a more complete discussion. Petition makes no attempt to refute this analysis.

We continue to believe that the penalties were set at the appropriate level for purposes of the IFR, given the information available to us at the time the rule was issued.

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[4] Each of the five engine manufacturers contacted assumed a different technology package on its baseline engine. Manufacturers that produced engines below 0.20 g/hp-hr based their compliance costs on the following baseline engines: engines equipped with similar (but not identical) SCR and EGR hardware, SCR-equipped engines without EGR, an EGR version of its own engine, or the non-SCR engines produced by a competitor. Some of these manufacturers estimated costs relative to more than one baseline engine, while others provided costs relative to a single baseline engine. Four of the manufacturers compared the costs for their assumed baseline engine to the costs for their actual compliant engines. The one non-SCR manufacturer contacted provided its projections of what it will spend to bring its current 2011 engine below 0.20 g/hp-hr.

C. Opportunity for Comment on Interim Final Rule

The petitioner is challenging EPA's finding that there was good cause to issue the IFR without prior notice and comment. EPA recognizes that promulgation of regulations without notice and comment should occur in very limited situations. However, EPA believes that the exigencies of the circumstances in this case justified NCPs to be in effect without notice and comment for an interim period.

The primary reason for EPA invoking the "good cause" exception for the IFR was the serious harm the delay associated with notice and comment procedures would have on one manufacturer, Navistar.[5] As Daimler acknowledges, Navistar has not introduced any engines into commerce that meet the 0.20 g/bhp-hr standard. EPA believes that absent NCPs, Navistar would soon run out of credits that it has relied upon to manufacture heavy-heavy duty engines. Based on its current credit balance and projected sales for this service class, EPA stated that it expects Navistar to run out of credits early in 2012. *See* Analysis of the Potential Economic Impacts of Delaying NCPs, EPA-HQ-OAR-2011-1000-0009.[6] As discussed above, EPA's current expectation is Navistar's model year 2012 heavy heavy-duty diesel engines will require emission credits or NCPs for purposes of certification. We believe that the earliest we could make NCPs available through a full notice-and-comment rulemaking would be later in model year 2012, which would likely be well after the manufacturer's credit supply would be depleted absent NCPs. Thus, making NCPs available through the Interim Final Rule is the only way to ensure that the manufacturer's depletion of its NOx credits will not force it to cease production of heavy heavy-duty engines this year.

The consequences of EPA's inability to certify Navistar engines with NCPs could be devastating to Navistar. In an Analysis of Potential Economic Impacts of Delaying NCPs, EPA-HQ-OAR-2011-1000-0009, EPA states that "[a]t a minimum, this would have led to Navistar ceasing nearly all assembly of heavy heavy-duty diesel engines. Navistar may or may not have continued production of heavy heavy-duty engines for export. Since Navistar's current tractor designs would need to be redesigned to accept other manufacturers' SCR-equipped engines, it would likely also have led to Navistar ceasing assembly of heavy heavy-duty vehicles for up to a year." *Id.* at 1. The analysis goes on to state that Navistar's global operations employed more than 15,000 workers in 2010 and estimate that its heavy heavy-duty Class 8 tractor sales represent about one-quarter of its revenue. Regarding the effect of Navistar's inability to certify engines, it states:

> While we do not have details of how many of Navistar's employees are currently involved in the assembly of heavy heavy-duty diesel engines and vehicles, if it is proportional to revenue, then it could be one-quarter of Navistar's employees. Halting nearly all assembly of heavy heavy-duty diesel engines and vehicles would have likely resulted in the layoff of these workers and would also have had a cascading impact on Navistar's suppliers, dealers, and other businesses that support the assembly plants. Thus, this scenario would likely have resulted in the layoff of several thousand workers.

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[5] EPA also noted that it established NCPs based on the existing regulatory provisions in 40 CFR part 86, subpart L, and merely added new penalty parameters to reflect the costs of compliance specific to the 2010 NOx standard, without substantially revising the existing regulatory provisions. Since these provisions have been established through notice-and-comment rulemaking several times before, interested parties have had opportunity to comment on them. EPA also noted that the interim NCPs will be of limited duration. EPA noted that by its own terms the interim rule will be applicable for less than two calendar years. EPA also noted that it intends to replace the interim NCPs as soon as possible with due consideration to comments on the co-proposal.

[6] EPA notes that Navistar, like most if not all manufacturers, has labeled this information as confidential business information. EPA would not release this information without first determining the claim to be erroneous.

Id.[7]

Petitioner raises several issues regarding EPA's rationale. EPA does not believe these arguments diminish the need for issuance of the IFR without prior notice and comment. Daimler argues that EPA should have started its rulemaking sooner, which would have allowed full notice and comment on the rule prior to it becoming final. Daimler argues that in 2009, EPA knew that Navistar could not manufacture an engine to meet the 0.20 g/bhp-hr standard. However, given Navistar's ability to use credits and the amount of time available to meet the standard, EPA did not at that time have enough information to determine that there was likelihood of a manufacturer who would not meet the standard for technological reasons. On February 22, 2010, EPA notified engine manufacturers that it appeared "that all heavy-duty diesel engine manufacturers will comply with the model year 2010 emission regulations" and that "no manufacturer has indicated that it will not be able to meet these requirements in the future."[8] EPA also noted that it was open to reevaluating these findings, but did not receive any response from any of the engine manufacturers until Navistar notified EPA in late 2011 that it would soon run out of emission credits.

Moreover, at the time when EPA began working on the noncompliance penalty rule, in the middle part of 2011, EPA did not believe that Navistar would run out of credits prior to the end of 2012. Given Navistar's sales of heavy heavy-duty engines in 2010, and Navistar's end of year credit total for heavy heavy-duty engines in 2010, EPA believed that Navistar would not need NCPs in 2012. However, towards the end of 2011, EPA received information indicating that Navistar's early 2011 engine sales were occurring at a much larger rate than its 2010 engine sales.[9] Upon confirmation by Navistar, EPA determined that Navistar would likely run out of credits in the early part of the 2012, which would not allow for notice and comment rulemaking prior to Navistar's credits being depleted, which would lead to Navistar not being able to sell engines while the notice and comment proceeding continued.

While Daimler may consider EPA's rule to be "coddling" its competitor, EPA believes its actions prevented what could have been catastrophic results for Navistar, with little if any harm (and for only a short term) to others. It is also clear that by enacting section 206(g), Congress indicated it did not intend companies to be forced out of business because they could not meet standards for a short period of time. While Daimler may say with hindsight that EPA should have known earlier to start its rulemaking process, the fact remains that, by the end of 2011, EPA was faced with the prospect of having a company not being able to introduce its heavy heavy duty engines, with serious harm to those who work for the company and its affiliates or promulgating an interim rule without notice and comment that would allow the company to continue operations while the notice and comment process was completed. Faced with this unhappy choice, EPA believes that it was within the bounds of the "good cause" exception in promulgating the IFR.

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[7] While the analysis notes that in the long run, customers may be able to sign new contracts with other engine and truck manufacturers, which could stimulate production and possibly jobs at the other companies, "it is likely that it would have taken manufacturers and suppliers at least several months, and perhaps as much as a year, to increase production enough to fully meet the new demand. The new jobs may have lagged even more if manufacturers chose to initially increase overtime hours instead of hiring new workers." *Id.* at 2.

[8] "Nonconformance Penalties for Heavy-Duty Diesel Engines in 2010 Model Year", Letter from Karl J. Simon, Director of the Compliance and Innovative Strategies Division, February 22, 2010, CISD-10-03 (HD)

[9] *See* Ward's Economic Group Data indicating Navistar-International Class 8 engine sales more than doubled from 2010 to 2011.

It is worth noting in addition that with regard to the actual notice Daimler had of this rulemaking, it is not appropriate to say that Daimler was not aware that EPA intended to promulgate in NCP rule or that it had no ability to comment. EPA did provide actual notice and opportunity for submission of relevant information. Specifically, EPA held two teleconferences with Daimler to allow its staff to provide input on the costs of compliance and any competitive disadvantage it may face. While EPA did not set the interim NCP parameters at the costs provided by Daimler, they were considered fully. *See generally,* "Interim and Proposed Technical Support Document ("TSD"), Chapter 3.

III. Harm to petitioner

The petitioner claims, without providing any specific evidence, that it will be harmed by the availability of the interim NCPs, and by their levels. Presently, Navistar is selling these same engines using credits that it has amassed in prior years, as permitted under the regulations. The only change that will come from this rule is that Navistar will have the opportunity to sell the same engines that they are currently selling, except with the requirement to pay the government a penalty for each engine sold. One could assume that Navistar paying an NCP would have one of two results: either Navistar would have lower profit for each engine sold, or it would increase the price of its engines. It is hard to see how the imposition of a penalty on one's competitor would harm petitioner.

We note that Navistar has been selling its engines with a slightly lower emissions surcharge than its competitors SCR engines for two years without any gains in market share relative to its 2008 sales. *See,* TSD, chapter 4.2; Figure 1-4. It has done this while using previously generated emission credits and paying no NCPs. Clearly, even if the penalty is too low, as Daimler claims, it will not allow Navistar to gain any market share because any NCP will increase its costs.

By requesting a stay of the Interim Final Rule, the petitioner is asking that no NCPs be made available during the interim period rather than asking for the penalty to be raised. This would likely result in Navistar being unable to manufacture any heavy heavy duty engines in the near future as Navistar depletes its emission credits. While this would certainly have an effect on Navistar, it is less obvious that it will have any effect in the short term, or certainly any significant effect, on Daimler. In order to show that the petitioner would lose sales if the Interim Final Rule is not stayed, the petitioner must show not only that Navistar will cease production or lose sales if the rule is stayed, it must also show that it is likely that Navistar's customers would instead buy from Daimler and that Daimler has the production ability to increase production and sell additional engines and vehicles during the interim period. However, the petitioner has provided no evidence that it could take advantage of Navistar's ceasing production. In evaluating this request, we have no way of knowing whether sales that would have gone to Navistar would in fact have gone to the petitioner, even if it does have the ability to significantly increase production during the interim period. It is possible that Navistar's customers would have chosen to delay purchase or even not purchase new trucks if the Navistar trucks were unavailable, or perhaps the customers would have instead purchased trucks from a different manufacturer. Moreover, even to the extent that the IFR interfered with Daimler's ability to increase its sales in the short term, which Daimler has not shown, EPA believes that this is best characterized as an impediment to a potential unplanned benefit that Mack could receive by taking advantage of a harm to their competitor, rather than actual harm to Mack..

Regarding the interim NCP level, the petitioner does not provide any evidence that setting the penalty at a different rate would have any impact on them at all. The only way in which it appears the petitioners could be harmed by a low penalty would be if it allowed Navistar to price its engines lower to gain or retain market share. The petitioners appear to be claiming that they will be harmed because Navistar will not be forced to increase its prices enough to cause it to lose market share. However, the petitioners provide no evidence that this will occur.

IV. Harm to EPA and Navistar

The petitioner claims that neither EPA nor Navistar would be harmed by a stay of the Interim Final Rule. We agree that the Agency would not be harmed by a stay. However, we do not agree that Navistar would not be harmed. We determined that Navistar could have run out emission credits needed for it heavy heavy-duty engines by early 2012 absent NCPs. As discussed above, EPA believes that if the NCP rule were not in effect prior to Navistar's depletion of its credits, Navistar and its affiliated companies would be faced with the possible layoffs of thousands of workers and severe corporate financial disruption. The losses these workers would face would be irreparable, as they would lose any income they would have received during that period, and the prospect of massive layoffs could be devastating to the communities that depend on these jobs.[10]

As discussed above, while it may be true that Navistar could have informed EPA earlier of its potential credit shortfall, this does not make the potential harm any less severe or any less irreparable.

Daimler claims that EPA's concerns regarding Navistar are speculative. They are not. While Navistar has claimed its end-of-year credit balance for heavy heavy duty engines and its engine sales data to be confidential business information, EPA has access to such information and it clearly indicates that in the absence of NCPs, Navistar would run likely out of credits early in 2012.

Regarding Navistar's statements on its 0.20 gram engine, as discussed above, EPA's initial view that EPA has substantial concerns regarding the ability of Navistar to certify its engine at a 0.20 g/bhp-hr level based on the information currently available to EPA, as there are several issues concerning the engine's ability to meet the standards and other regulations. In addition, the engine apparently will not be ready for production until June 15, 2012, even if it were able to be certified. Therefore, in the absence of the IFR, Navistar will still not have any ability to manufacture and introduce heavy heavy duty engines once it runs out of credits.

V. Public interest

Daimler provides no new information or arguments in its discussion of why it believes granting the stay is in the public interest. EPA does not believe granting the stay request would be in the public interest.

EPA believes that three factors must be considered in determining whether a stay of the Interim Final Rule would be in the public interest:

1. The environmental effects of allowing production of engines with emissions above the 0.20 g/hp-hr NOx emission standard.

[10] EPA notes that since the initial filing of this request for stay, EPA has certified certain Navistar engine families using NCPs. EPA interprets Volvo's petition as intending that EPA not have ever granted these certifications or to in some manner withdraw them.

2. The economic effects of Navistar being forced to cease production of its heavy heavy-duty vehicles.
3. The general public interest in having an opportunity to comment on regulatory action.

We believe that Congress addressed the first factor in specifying that NCPs be made available when needed. In doing so they effectively determined that the public interest in preventing a manufacturer from being forced from the market outweighs any short-term harm to the environment. In part this allows EPA to issue standards for heavy-duty vehicles and engines that are technology forcing in nature, with NCPs acting in part as a safety valve.

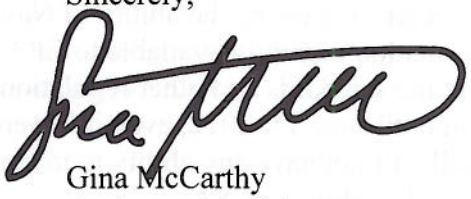
As noted above, EPA has determined that without the interim NCPs, Navistar would be forced to cease production of heavy heavy-duty vehicles during the interim period. Even if one does not believe that Navistar deserves protection from harm that results from its own engineering choices, it does not follow that it would be in the public interest for it to cease production of these vehicles. Forcing Navistar form the market would harm the workers at Navistar and it suppliers. We estimate that this would impact thousands of workers. It would also harm customers who are awaiting delivery of vehicles they have ordered. It would finally hurt the public interest in general due to the loss of economic activity caused by the ceased production.

Finally, while we agree that the public has a general interest in having an opportunity to comment on regulatory action, we do not believe, in this particular situation where Congress has prioritized the interests of companies who lag behind, that it outweighs the public interest in avoiding the consequences discussed above.

VI. Conclusion

For the reasons discussed above, EPA is denying Daimler's request for a stay of the Interim NCP rule.

Sincerely,



Gina McCarthy
Assistant Administrator